Grundler

06 MAR 1985

MEMORANDUM

SUBJECT: Release Language in Reilly Tar Consent Decree

FROM: Robert B. Schaefer,
Regional Counsel

TO: Carol Green, Assistant Chief
Environmental Enforcement Section, DOJ

This memorandum expresses my concern over the "release" and "covenant not to sue" language in the above-identified consent decree, as well as my concern over the use of such language in consent decrees generally.

I am sorry for the delay in sending it; I am sure you have eagerly awaited it since we discussed the subject briefly in my office. There has been some feeling here that this ought to be more of an advocate's piece, and ought to be researched more thoroughly. I am inclined to view the question as one involving litigation expertise and fundamental legal practice and procedure, more than as a matter of agency policy only. As such, I am content to entrust the necessary research to the Department of Justice, confident that you will ultimately come up with the correct answer. Moreover, I believe the question is so fundamental that extensive research will not provide an answer.

The December 5, 1984, Interim CERCLA Settlement Policy discusses the giving of releases and covenants not to sue. It appears that in implementing the Policy and in drafting consent decrees and settlement agreements, we are including releases and covenants not to sue, regardless of whether the document is a consent decree or a settlement agreement. What may be appropriate for an out-of-court settlement agreement may not be appropriate for a consent decree.

I have no problem with a settlement agreement containing covenant not to sue language. Presumably, such an agreement resolves all identified issues between the parties, is entered into by the parties voluntarily, and is not under the jurisdiction of a court. Release language may also be appropriate if, at the time of settlement, the settlement agreement does not require the

parties to take any further action, or EPA is satisfied that the party settling with EPA has fulfilled all its responsibilities for the environmental problems identified in the agreement. I do have problems, however, with "release" or "covenant not to sue" language in consent decrees resolving cases already filed with the court. We have already sued the parties; thus, it makes no sense to covenant not to sue them. A "release" of the claim or cause of action underlying the complaint and consent decree is equally inappropriate.

A "release" is commonly defined as "the abandonment of a claim to the party against whom it exists; it is a surrender of a cause of action . . ." Melo v. National Fuse & Powder Co., 267 F.Supp. 611 (Col. 1967). Once the government files a complaint, its cause of action is merged in the complaint; it is certainly not abandoned or surrendered. When the litigation is resolved by a consent decree there is, by operation of law, a merger of the claims presented in the complaint into the consent decree to the extent that the decree is carefully drafted to specify exactly which claims are being resolved and which are not. Thus, to the extent defined and consented to by the parties, the consent decree is a disposition of the claims presented in the complaint. SEC v. Thermodynamics, Inc., et al, 319 F.Supp. 1380, 1382 (D. Col. 1970) The rights and liabilities of the parties with respect to those claims are thereafter determined by the consent decree itself. Accordingly, I suggest that it is no more appropriate to speak of a release of those claims in the original cause of action which are disposed of by the decree, than it would be to have the consent decree contain a provision dismissing the complaint that it resolves. The concepts are mutually exclusive.

I am concerned at the interpretation and construction that a court might place on the "release" and "covenant not to sue" language. What are we releasing and upon what facts are we covenanting not to sue? Indeed, is a consent decree viable at all if the underlying cause of action has been "surrendered" by a release?

In Reilly Tar, for example, while it might be argued that the "release" language is ineffective because of the ongoing responsibilities of Reilly Tar in the remedial action plan (RAP), we have no assurance that a court, at some future date, will hold that the RAP provisions control over the "release" language in the consent decree. The court may find that there is an ambiguity in the consent decree and RAP, and, as a result, find the RAP unenforceable. In United States v. Brown, 518 F.2d 714 (10th Cir. 1975), the District Court found that a "technical ambiguity" in the consent decree was a defense to a noncompliance action brought by the Government. The Government's case was saved only because the Court of Appeals failed to see the ambiguity, and reversed the District Court.

The foregoing may or may not be significant risks; that is really not the point. Why take any such risk at all? I understand that it is felt that defendants will insist on some sort of "finality" language in consent decrees. If so, the government can commit to issuing full or partial satisfactions as and when appropriate. Anything more is unnecessary. In Curry v. Curry, 65 App. D.C. 47, 79 F.2d 172, 174 (1935), the court stated:

> For a consent decree, within the purview of the pleadings and the scope of the issues, is valid and binding upon all parties consenting, open neither to direct appeal nor collateral attack. 'A fortiori, neither party can deny its effect as a bar of a subsequent suit on any claim included in the decree.'

See also, Bloomer Shippers Ass'n. v. Illinois Central Gulf Railroad Co., 655 F.2d 772, 777 (7th Cir. 1981); Nash County Board of Education v. The Biltmore Company, 640 F.2d 484, 487 (4th Cir. 1981), and cases cited therein.

We should not allow ourselves to be led into continuing the use in consent decrees of language and of concepts that arose in entirely different and distinguishable contexts and circumstances. It is my hope that the Interim CERCLA Settlement Policy can be modified to reflect the foregoing. I request your consideration of these views and, if you deem it appropriate, your concurrence.

cc: F. Henry Habicht, II
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David Hird
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